# 79-1991

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

No.

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FRED LOWENSCHUSS,

*Petitioner,*

*vs.*

C. G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

and

RACHEL C. CARPENTER and THE McINTOSH FOUNDATION,

*Respondents.*

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## Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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WILLIAM D. PARRY,
*Counsel for Petitioner,*

8th Floor,
1201 Chestnut Street,
Philadelphia, Pennsylvania 19107
(215) LO 3-0606

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IN THE

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FRED LOWENSCHUSS,

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C.G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

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RACHEL C. CARPENTER, and THE McINTOSH FOUNDATION,

*Respondents.*

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## Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner, Fred Lowenschuss, as Trustee for Fred Lowenschuss Associates Pension Plan, the named plaintiff and appellant below, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered in these proceedings on January 9, 1980.

## OPINIONS BELOW

The United States District Court for the Southern District of New York, by Opinion dated June 14, 1979, and by a final Order and Judgment entered on June 25, 1979, approved, over plaintiff's objection, a class action settlement amounting to approximately $1.2 million, which had been reached by a non-representative class member and certain counsel on July 31, 1978, after plaintiff had been disqualified as class representative and before any substitute representative had been approved. This opinion, which is not officially reported, is printed at Appendix "A", *infra*, pages 1a through 14a.

On January 9, 1980, the Court of Appeals for the Second Circuit entered an opinion, *Lowenschuss v. Bluhdorn*, 613 F.2d 18 (2d Cir. 1980), in which the Court of Appeals affirmed the judgment and various prior orders of the District Court (including its refusal to enforce a settlement of $4,359,376.00 that had previously been negotiated by plaintiff with two of the defendants) and assessed double costs against plaintiff-appellant pursuant to Fed. R. App. P. 38. This opinion is printed at Appendix "B", *infra*, at pages 15a through 20a.

On January 23, 1980, petitioner filed with the Court of Appeals for the Second Circuit a Petition for Rehearing In Banc.* Said petition was denied by the Court of Appeals on March 20, 1980, without opinion. The Court of Appeals' denial of the petition for rehearing and denial of petitioner's suggestion for rehearing in banc appear at Appendix "C", *infra* at pages 21a through 22a.

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* A copy of the Petition for Rehearing In Banc is being lodged by petitioner with the Clerk of this Court, together with the Brief and Reply Brief for Appellant and Joint Appendix.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on January 9, 1980, and a copy thereof is appended to this petition at Appendix "B", *infra*, pages 15a through 20a. A petition for rehearing in banc was denied by said Court in Orders made and entered on March 20, 1980, copies of which appear at Appendix "C", *infra*, pages 21a through 22a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether the punitive imposition of double costs upon a plaintiff-appellant by a Court of Appeals pursuant to Rule 38 of the Federal Rules of Appellate Procedure is arbitrary, capricious, and without due process of law where:

a. The appeal raised substantial and meritorious legal issues, which were fully supported by well-established case law and express statutory authority, which the Court of Appeals failed to address;

b. The Court of Appeals failed to make any specific finding that the appeal was "frivolous" within the meaning of Rule 38, or to explain the reasons why sanctions were being imposed;

c. The other parties to the appeal had neither requested sanctions nor suggested that the appeal was "frivolous" within the meaning of Rule 38;

d. The imposition of sanctions came completely unexpectedly in the Court of Appeals' Opinion, without any prior notice to appellant that sanctions were

being considered, and without any opportunity for appellant to be heard on the issue of whether sanctions should be imposed; and

e. It appears that sanctions were imposed simply as punishment for plaintiff's calling attention to the conduct of various participants in the litigation and for plaintiff's opposition to a class action settlement allegedly for "personal reasons", and not because the appeal itself was in any way frivolous or unmeritorious.

2. Whether it is within the discretion of a District Court to approve a class action settlement based on an evaluation of the case that is clearly and fundamentally erroneous as a matter of law, both as to liability and measure of damages.

3. Whether, in proceedings to determine the fairness of a proposed class-action settlement reached by a non-representative class member under irregular circumstances, the District Court should permit examination of the conduct of the settlement negotiations—such as in a case where:

a. The proposed settlement was negotiated, over the named plaintiff's objections, by an individual class member after plaintiff had been disqualified as class representative and before a substitute representative was appointed;

b. Said class member was subject to certain defenses not applicable to the class in general;

c. Said class member had been offered a small amount by defendants as a separate settlement, but was able to increase this amount by also settling the claims of the class;

d. The role of said class member as the subsequently designated class representative was merely to recommend the settlement to which it had already agreed; and

e. The proposed settlement was less than half the amount that two of the defendants had agreed to pay only one year earlier.

## CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The case involves Federal Rule of Appellate Procedure 38, which provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

The case involves Federal Rule of Civil Procedure 23(e), which provides:

> "*Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Also involved in this case are the provisions of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78n(e), reproduced at Appendix "D", *infra*, page 23a; and Sections 2-708 and 8-107(2) of the New York Uniform Commercial Code, which are reproduced at Appendix "D", *infra*, pages 23a through 24a.

## STATEMENT OF THE CASE

### 1. *Factual Background*[1]

This is a class action seeking damages for violations of the Williams Act[2] and for breach of contract under state law, pursuant to pendent jurisdiction, arising out of a cash tender offer made by Gulf & Western Industries, Inc. ("G&W"), on February 1, 1973, to purchase up to 3.75 million shares of the common stock of The Great Atlantic & Pacific Tea Co. ("A&P") for a net price of $20.00 per share (hereinafter referred to as the "Tender Offer").[3]

The action was commenced by plaintiff on February 15, 1973,[4] on behalf of the Pension Plan of which he is

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1. This Court's attention is respectfully referred to petitioner's Brief for Appellant, pp. 7-25, and Reply Brief for Appellant, pp. 27-35 (copies of which are being lodged by petitioner with the Clerk of this Court, together with the Joint Appendix and Petition for Rehearing In Banc), for a detailed discussion of the factual background and prior proceedings in this litigation.

2. Securities Exchange Act of 1934 §§14(d)-(f), 15 U.S.C. §§78n(d)-(f), Pub. L. 90-439, 82 Stat. 454.

3. The facts and background concerning the Tender Offer are described at length in the Court of Appeals' opinions in *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.* ("G&W v. A&P"), 476 F.2d 687 (2d Cir. 1973), and in a previous appeal in the present action, sub nom. *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975). A copy of the Tender Offer is reproduced at pp. A106-10 of the Joint Appendix to the Court of Appeals, which is being lodged by petitioner with the Clerk of this Court.

4. *Lowenschuss v. C.G. Bluhdorn, Gulf & Western Industries, Inc., and Kidder, Peabody & Co.* (originally captioned *"Lowenschuss v. Kane, et al."*), was filed in the U.S. District Court for the Eastern District Court of Pennsylvania and then transferred on defendants' motion to the Southern District of New York, under Docket No. 73 Civ. 2021. In addition, two related class actions (73 Civ. 2931 and 76 Civ. 3557) were subsequently instituted and ultimately consolidated with the first action.

trustee [5] and all other persons who tendered shares of A&P common stock to G&W pursuant to the Tender Offer —a total of 1,694 persons or entities who had delivered an aggregate of 3,806,769 shares to G&W's depository prior to the Tender Offer's deadline of February 13, 1973. The defendants include G&W, Charles G. Bluhdorn ("Bluhdorn") (G&W's chairman of the board, chief executive officer, largest stockholder, and originator of the Tender Offer), and Kidder, Peabody and Company ("Kidder") (the dealer-manager for the Tender Offer).[6]

Consummation of the Tender Offer was preliminarily enjoined on February 13, 1973, due to the likelihood that G&W's acquisition of the A&P shares would result in substantial violations of the antitrust laws and that G&W had made serious misrepresentations and omissions in the Tender Offer, in violation of the Williams Act.[7] See *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.* ("G&W v. A&P"), 356 F. Supp. 1066 (S.D.N.Y. 1973). On March 12, 1973, the Court of Appeals affirmed the preliminary injunction, finding that the record demonstrated "a probability of A&P's success on the merits" in

5. Plaintiff is an attorney actively engaged in the practice of law in Philadelphia, Pennsylvania, with the firm of Fred Lowenschuss Associates, a professional corporation, and is sole trustee of Fred Lowenschuss Associates Pension Plan—a trust created by the firm to provide benefits for the firm's employees.

6. The original complaint also named the officers and directors of A&P as defendants, but these parties were dropped after a preliminary injunction obtained by A&P against G&W's Tender Offer was affirmed by the Court of Appeals.

7. Securities Exchange Act of 1934, §§14(d)-(f), 15 U.S.C. §§78n(d)-(f). Among the numerous misrepresentations made by G&W was the statement that G&W was acquiring the shares of A&P solely "as an investment," whereas the Court of Appeals found a substantial likelihood that G&W would seek to obtain control of A&P and had the potential to obtain that goal. *G&W v. A&P, supra*, 476 F.2d at 694, 696-97.

proving antitrust and securities law violations by G&W in making the Tender Offer. *G&W v. A&P*, 476 F.2d 687, 694-97 (2d Cir. 1973).

Meanwhile, the 3,806,769 tendered shares continued to be "frozen" in G&W's depository until March 14, 1973, when G&W announced that tendering shareholders could withdraw their shares following affirmance of the preliminary injunction. By that time, the market price of A&P stock (which had been between $18.15 and $18.50 per share at the time of tender) had dropped to $15.00 per share or less—at least $5.00 per share below the Tender Offer price. Nevertheless, G&W continued to extend the Tender Offer until July 25, 1973, when G&W finally revoked it and settled the intercorporate litigation with A&P —rather than attempting to defeat the preliminary injunction on the merits. By then, the market price of A&P had dropped to $12.50 per share.

As a result, plaintiff's Pension Plan, which had purchased and tendered 2,000 shares of A&P in reliance upon the Tender Offer, suffered actual, out-of-pocket losses of $7.27 per share, totalling $14,530.88. Class members in general suffered contract damages of at least $5.00 per share, plus interest and brokerage fees, with total damages amounting to approximately $30 million.[8]

On July 25, 1973, the District Court (per the Honorable Kevin T. Duffy) certified this as a class action and designated plaintiff as a fair and adequate representative of the class, but at the same time summarily dismissed the action on the merits. *Lowenschuss v. Kane*, 367 F. Supp. 911 (S.D.N.Y. 1973). On appeal, the Court of Appeals

8. As estimated by Milton Paulson, Esquire, co-counsel for the class, who has acknowledged that the correct measure of contract damages would be between $6.00 and $8.00 per share. See Transcript of hearing, Jan. 16, 1979 (Joint Appendix, pp. A1528-29).

reversed the summary dismissal, and held that the complaint stated valid causes of action both under the Williams Act and for breach of contract. *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975).[9] On June 17, 1976, the District Court (per the Honorable Dudley B. Bonsal) designated plaintiff and plaintiff-intervenor Rachel C. Carpenter[10] as co-representatives of the class.[11]

On June 20, 1977, plaintiff and an attorney for G&W and Bluhdorn negotiated a settlement in the sum of $4,359,376.00 (plus interest at the prime rate from June 1, 1977), which was reduced to writing and signed by said defendants' attorney—who later crossed out his signature because plaintiff objected to the release of various aiders and abettors to the Tender Offer who were not contributing to the settlement.[12] Despite plaintiff's objection to said release, it was nevertheless understood that the settlement would be submitted to the Court and the class for approval. However, before this could be done, G&W and Bluhdorn refused to go through with the settlement, allegedly on the grounds that they did not want to give

9. An excerpt of the Court of Appeals' opinion, as it pertains to the contract claim, is printed at Appendix "E", *infra*, pages 25a through 33a.

10. Rachel C. Carpenter had tendered 1,957,012 shares of A&P (amounting to 51.4 per cent of the shares tendered). She was represented in this litigation by Milton Paulson, Esquire, who was designated as co-counsel for the class, together with Arnold Levin, Esquire, counsel for plaintiff.

11. *Lowenschuss v. Bluhdorn*, 72 F.R.D. 498 (S.D.N.Y. 1976).

12. Because the settlement was much less than the full value of the claims of the class, plaintiff objected to the release of any aider-abettor who would not be contributing to the settlement—including defendant Kidder and prospective defendant Simpson Thacher and Bartlett ("Simpson Thacher"), counsel for G&W and Bluhdorn, which firm plaintiff had moved to join as a defendant based on Bluhdorn's testimony at his deposition and other facts. Plaintiff also questioned the propriety of Simpson Thacher obtaining a release for itself, using its client's money.

credence to a series of articles that appeared in the *New York Times,* which cited evidence obtained by the Securities and Exchange Commission that Bluhdorn and other representatives of G&W had committed perjury and destroyed documents relating to the Tender Offer.[13]

Milton Paulson, Esquire, as counsel for plaintiff-intervenor Rachel Carpenter and co-counsel for the class, moved the District Court to compel consummation of the $4,358,-376.00 settlement, which motion was denied after a hearing on January 23 and 24, 1978. On April 7, 1978, the Court of Appeals dismissed Paulson's appeal of this ruling for lack of jurisdiction, on the grounds that the District Court's order was interlocutory and not appealable until final judgment.[14]

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13. "SEC Presses Wide Investigation of Gulf and Western Conglomerate," *New York Times,* Sunday, July 24, 1977, pp. 1, 34 (Joint Appendix, A309-11), with additional reports appearing July 25 and 26, 1977. According to the first of these articles, the SEC had obtained evidence that, prior to the Tender Offer, G&W had made an in-depth marketing study of A&P, which indicated that G&W had intended to acquire the A&P shares for the purpose of exercising control over A&P's management, rather than merely as an "investment" as G&W had stated in the Tender Offer. Furthermore, the SEC's evidence indicated that, during the intercorporate litigation in 1973, Charles Bluhdorn falsely denied under oath the existence of said marketing report, and then caused the report to be destroyed. Knowledge of this action was then relayed to William J. Manning, Esquire, a senior partner of Simpson Thacher who had attended the deposition, according to the SEC's evidence. (Although plaintiff had served extensive interrogatories upon defendants, asking, inter alia, what market surveys G&W had made prior to the Tender Offer and what documents had been destroyed, these interrogatories have never been answered.)

The SEC investigation has recently resulted in the filing of a 60-page complaint by the SEC against G&W, Bluhdorn, and others.

14. This appeal, although taken without jurisdiction, was never deemed to be "frivolous," nor were double costs assessed against Paulson or Carpenter, as they were against Lowenschuss, when he appealed this same issue at the proper time.

Carpenter thereafter abandoned her role as co-representative of the class, by agreeing to a separate settlement with G&W for $600,000.00, or approximately $.30 per share tendered—an extremely small rate of recovery which was dictated by peculiar circumstances unique to Carpenter.[15] Attorney Paulson and the attorneys for defendants entered into a stipulation of dismissal as to Carpenter on April 17, 1978, and submitted it to the Court for approval.

On April 20, 1978, the District Court granted defendants' motion to disqualify Lowenschuss as class representative [16] and ordered plaintiff's counsel, Arnold Levin, Es-

15. This settlement was reached under the pressure of an order requiring Carpenter to answer written interrogatories that had been propounded to her by defendants, or else have her case dismissed. Because of an alleged "litigation phobia," Carpenter had previously refused to submit to any oral deposition, and now was apparently unwilling or unable even to answer written inquiries.

Furthermore, Mrs. Carpenter, as an A&P "insider," had access to certain knowledge at the time of the Tender Offer that made her vulnerable to defenses not applicable to the class in general. For example, her personal attorney was Edward J. Toner, Esquire, who was also Carpenter's representative on the A&P board of directors and executive committee that had voted to oppose the Tender Offer. During the period of the Tender Offer, Toner had met privately with Bluhdorn to discuss G&W's intentions concerning A&P.

Despite the enormity of Carpenters' tender, she never instituted any separate action against G&W, never appeared in court, never submitted to any discovery, and never personally participated in the litigation in any way. In fact, it was Toner who retained Milton Paulson, Esquire—who himself did not even speak to Carpenter until well into the litigation. It appears that these attorneys took advantage of plaintiff's class action to bolster a claim that Carpenter may not have been able to maintain successfully in a separate suit.

16. Disqualification was on the grounds that plaintiff was not an adequate representative of the class because his potential recovery of counsel fees would exceed his potential recovery of damages as a member of the class. Plaintiff had originally represented the class in the dual capacity of both class representative and as an attorney in the firm of Fred Lowenschuss Associates, which originally served as co-counsel for the class. However, this fact had

quire, to withdraw as class counsel, effective upon the qualification of a substitute class representative and class counsel. *Lowenschuss v. Bluhdorn*, 78 F.R.D. 675 (S.D.-N.Y. 1978).

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never been hidden by plaintiff, and was at all times known by all parties and by the Court. Furthermore, when plaintiff instituted this action in the Eastern District of Pennsylvania, it was the well-established rule in that District that such representation was proper. After this rule was changed by *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976), plaintiff's firm immediately withdrew its appearance.

At the time of said withdrawal, plaintiff had written a letter to Arnold Levin, Esquire, on May 10, 1976, which contained a rough estimate of the time that the Lowenschuss firm had spent in handling the case (Joint Appendix, pp. A298-99). This did *not* constitute any agreement or claim for legal fees. (Nor did plaintiff at any time make a claim for fees based on said estimate.) As expressly emphasized in Mr. Levin's response of May 14, 1976 (*id.* at A301), it was understood that any petition for compensation would be based on the firm's actual records, to be submitted to the Court at the appropriate time. Furthermore, the rate of compensation referred to by plaintiff was only $75.00 per hour. Only if the Court applied a "risk multiple" of four would this amount to the $300-per-hour figure referred to in the Courts' opinions. It is interesting to note that, *after* plaintiff had produced a copy of this letter and had submitted to deposition, the defendants were nevertheless perfectly willing to accept him as a proper class representative for the purpose of the June 1977 settlement.

The motion to disqualify was filed on September 14, 1977, by counsel for G&W and Bluhdorn—who had threatened, on June 20, 1977, to have plaintiff disqualified if he objected to the proposed settlement release. Defendants' accusation that plaintiff rejected the June 1977 settlement because of an interest in obtaining a large attorney's fee is totally contrary to both fact and logic. If the plaintiff's concern was that of assuring a large legal fee, he would have agreed to both the settlement and the release of non-contributing aiders and abettors and thereby have entirely avoided the defendants' threat to have him disqualified if he did not. At a conference before Magistrate Schreiber on June 30, 1977, plaintiff made it clear that he was *not* concerned about counsel fees, but about the impropriety of defendants' threatened attack on class representation (Joint Appendix, pp. A1364-65). It was *after* Magistrate Schreiber had assured plaintiff of his authority to act on

Before a new representative could be substituted, the defendants negotiated a settlement with The McIntosh Foundation ("McIntosh")—a large A&P shareholder that had tendered 200,000 shares of A&P stock.[17] Although G&W had previously offered McIntosh a maximum of only $.60 per share for its individual claim (due to possible individual defenses against McIntosh as an A&P "insider"[18]), McIntosh was able to increase this amount to

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behalf of the class (*id.* at A1365) that plaintiff set forth his views on the settlement in a letter dated July 6, 1977 (*id.* at A241-45). Magistrate Schreiber accepted plaintiff's position as being made in good faith (*id.* at A1395). These proceedings demonstrate that plaintiff's evaluation of the 1977 settlement was not and could not have been motivated by any interest in legal fees. In any event, the June 1977 settlement still would have been submitted to the Court and the class for approval, had not G&W and Bluhdorn backed out on the basis of the *New York Times* articles.

17. At the time of the Tender Offer, McIntosh Foundation owned 1,100,000 shares of A&P. See *G&W v. A&P, supra*, 476 F.2d at 696, n.15. An additional 50,000 shares were tendered by a closely related member of the McIntosh family. Although the McIntosh Foundation, through its counsel, had filed a brief *amicus curiae* to the Court of Appeals in the intercorporate litigation, the McIntosh Foundation and its counsel had repeatedly declined plaintiff's invitations to join and assist in this litigation at the outset. McIntosh's counsel, Barrett Smith Schapiro Simon & Armstrong, had flatly told plaintiff that it does not handle cases on a contingent fee basis and that McIntosh was not willing to bear the fees and expenses involved. McIntosh did not show any active interest in this case until it learned of the June 1977 settlement.

18. When McIntosh first sought to intervene as a named plaintiff in May 1978, defendants appeared ready to mount a vigorous opposition. Defendants were successful in forcing Melvyn I. Weiss, Esquire (an experienced class action attorney), to withdraw his appearance on behalf of McIntosh, after he had indicated that he might seek damages beyond the previous $4,359,376.00 settlement. See Transcript of hearing, May 18, 1978, p. 38. Furthermore, at the deposition of Michael McIntosh on May 24, 1978, they attempted to develop individual defenses against McIntosh as an A&P "insider" and based on previous positions taken by McIntosh

$.94 per share simply by settling on behalf of the class. A stipulation of settlement was signed on July 31, 1978, joined in by Paulson and various other counsel over plaintiff's opposition. On September 14, 1978, the District Court appointed McIntosh as class representative to succeed plaintiff, in which capacity McIntosh then recommended the settlement that it had already agreed to. On October 26, 1978, the Court approved notice to the class of the proposed settlement and fixed a hearing date. Meanwhile, Carpenter was permitted to consummate her separate settlement,[19] and her claims were finally dismissed on November 21, 1978.

Plaintiff filed extensive objections as to the inadequacy and unfairness of the proposed settlement (Joint Appendix, pp. A848-919) and appeared as an objector at the hearings before Judge Bonsal.[20] The proceedings were based entirely on the colloquy of counsel, and no testimony or cross-examination was permitted with regard to the manner in which the settlement was negotiated and arrived at (Joint Appendix, pp. A1489-93), nor as to the merits of the proposed settlement itself.

Ultimately, proofs of claim for approximately 1,130,000 shares were filed, or about 62 per cent of the shares tendered. At the hearing on May 30, 1979, it was announced that G&W had agreed to pay an additional amount, up to $150,000.00, toward the counsel fees and

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that had been inconsistent with the claims of the class. However, defendants' opposition vanished as soon as McIntosh agreed to settle (Joint Appendix, p. A827).

19. Court approval of Carpenter's separate settlement had been delayed, pending qualification of a substitute representative for the class.

20. The hearings, which were held on January 16, January 31, March 14, May 23, and May 30, 1979 (Joint Appendix, pp. A1467-619), were repeatedly continued because of class counsel's difficulty in effecting individual notice on all of the class members.

expenses of the class. Consequently, the total value of the present settlement is approximately $1,212,200.00.

On June 14, 1979, the District Court, per the Honorable Dudley B. Bonsal, filed a memorandum opinion approving the settlement (printed at Appendix "A", *infra*, pages 1a through 11a). On June 26, 1979, a final Order and Judgment was entered, approving the settlement, dismissing all of the claims of the class with prejudice. (See pages 12a through 14a, *infra.*)

### 2. *Proceedings Before the Court of Appeals*

Plaintiff filed his notice of appeal to the Court of Appeals for the Second Circuit on July 18, 1979. Among the grounds asserted by plaintiff were:

> (a) that the District Court, in approving the settlement, had failed to consider well-established principles of contract law (including the doctrine of "assumption of the risk of impossibility"), under which G&W was clearly liable to the class for breach of contract;
>
> (b) that the Court had based its evaluation of the class' likelihood of success on the erroneous assumption that the burden would be on the plaintiff to disprove defendants' alleged defense of "impossibility of performance," rather than upon defendants to prove impossibility, freedom from fault, and lack of foreseeability as an affirmative defense; and
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> (c) that the Court had failed to apply the appropriate measure of damages, as expressly provided by the New York Uniform Commercial Code, which was three times greater than the measure of damages relied upon by the Court, and more than six times greater than the amount of the settlement; and

(d) plaintiff also preserved for review the question of whether the Court had erred in refusing to enforce the previous settlement of $4,359,376.00 (with respect to which the earlier appeal by Milton Paulson, Esquire, had been dismissed as premature).[21]

At no time during the pendency of the appeal did any of the appellees or the Court suggest that this appeal was "frivolous" within the meaning of Rule 38 of the Federal Rules of Appellate Procedure, nor was any motion made to impose double costs against appellant. On the contrary, the appellees were unable to offer any challenge on the merits to appellant's statement of the law on the two most fundamental issues involved—contractual liability and the appropriate measure of damages.

However, on January 9, 1980, the Court of Appeals not only affirmed the District Court's approval of the settlement of this class action (and certain other previous orders) without addressing the substantial legal issues raised by the petitioner, but also assessed double costs against him pursuant to Rule 38, publicly charged petitioner with "highly improper conduct" as an attorney, and requested that the Pennsylvania Bar Association review his conduct in this case.[22]

Morally certain that there was no impropriety in his conduct, and that an independent review of this matter would fully exonerate him, petitioner promptly forwarded

21. See Brief for Appellant and Reply Brief for Appellant to the Court of Appeals (copies of which are being lodged by petitioner with the Clerk of this Court).

22. Said decision is contained in a *per curiam* opinion (printed at Appendix "B," *infra*, pages 15a through 20a) by the Honorable Walter R. Mansfield, Circuit Judge, the Honorable Leonard P. Moore, Senior Circuit Judge, and the Honorable Edmund L. Palmieri, Senior District Judge, Southern District of New York.

to the Disciplinary Board of the Supreme Court of Pennsylvania a copy of the Court of Appeals' Opinion, together with all briefs and the Joint Appendix in the appeal.[23] Up to the present time, petitioner has received no notice that the Court of Appeals has lodged any formal complaint against him with the Disciplinary Board.

On January 23, 1980, petitioner filed with the Court of Appeals a timely Petition for Rehearing in Banc, which was denied on March 20, 1980. On March 31, 1980, the Court of Appeals transmitted to the District Court its mandate together with a Statement of Costs, assessing double costs against petitioner in the sum of $6,566.26.[24]

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23. The District Court for the Southern District of New York, per Honorable Kevin T. Duffy, had previously required plaintiff to defend himself before the Disciplinary Board of the Supreme Court of Pennsylvania, when it summarily dismissed this action. *Lowenschuss v. Kane, supra,* 367 F. Supp. at 913 n.1. After investigation of Judge Duffy's groundless complaint, the Disciplinary Board fully exonerated plaintiff, setting forth its final determination in a letter dated November 20, 1973, that the plaintiff was "not guilty of any unprofessional conduct in violation of the Code of Professional Responsibility." Joint Appendix, p. A331.

24. In addition, the law firm of Fred Lowenschuss Associates has been penalized by the District Court's complete denial, on March 20, 1980, of any counsel fees or reimbursement of expenses whatsoever.

## REASONS FOR GRANTING THE WRIT

**I. The Court of Appeals, by punitively imposing double costs upon plaintiff-appellant, pursuant to *Rule* 38 of the Federal Rules of Appellate Procedure, without notice, in a non-frivolous appeal, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

There was no basis for the assessment of double costs against plaintiff-appellant, because the appeal was not frivolous, but on the contrary, raised substantial and meritorious issues which were not addressed by the Court of Appeals, and which should have resulted in reversal.

Although the Court of Appeals stated that it was assessing double costs against plaintiff-appellant pursuant to *Rule* 38 of the Federal Rules of Appellate Procedure, nowhere in its opinion did it set forth any specific determination that the appeal was "frivolous", as required by *Rule* 38. A "frivolous appeal" has been defined as:

> "One in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." Black's Law Dictionary, 601 (5th ed. 1979).

In other contexts, a "frivolous appeal" has been said to be one which presents no debatable question and no reasonable possibility of reversal, the word "frivolous" meaning "of little weight or importance, not worth notice, slight." See, *e.g.*, *United States v. Esters*, 161 F. Supp. 203, 206 (W.D. Ark. 1958); *United States v. Piper*, 227 F. Supp. 735, 740 (N.D. Tex. 1964).

When the issues raised by an appellant present questions of law which are not totally without merit on their face, there is no basis for assessment of double costs, even if the appeal is unsuccessful. See, *e.g.*, *Harrison v. Bloomfield Bldg. Industries, Inc.*, 435 F.2d 1192, 1196-97 (6th Cir. 1970); *Babcock v. Wilcox Co. v. Foster Wheeler Corp.*, 432 F.2d 385 (3d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971); *Felder v. Hartnett County Board of Education*, 409 F.2d 1070, 1075 (4th Cir. 1969); *Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 178 (5th Cir. 1972).

Far from being frivolous, the plaintiff's appeal raised legal issues of obvious substance and merit, which deserved full judicial consideration. Foremost among these was plaintiff's contention that the District Court not only abused its discretion in approving a settlement that was clearly inadequate, but also committed crucial errors of law in evaluating the class action, by totally disregarding a fundamental theory of contractual liability and by failing to apply the appropriate measure of damages as expressly provided by the New York Uniform Commercial Code.

In determining the fairness of a class action settlement, "the most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974).[25]

Obviously, the proper evaluation of a settlement is impossible if the District Court has made substantial and

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25. See also *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971), which states that the District Court must make an attempt to arrive at some evaluation of the points of law on which the settlement is based.

fundamental errors of law regarding the two most important factors involved—the likelihood of success on the merits and the measure of damages. Such errors must necessarily constitute an abuse of the District Court's discretion in approving a settlement. If an appeal from such errors is penalized by a Court of Appeals as being "frivolous", there will be an unhealthy "chilling" effect on all such appeals, which would deprive all class members of the protection of appellate review.

The danger of such a "chilling" effect, which would result from the arbitrary imposition of *Rule* 38 sanctions, has been articulated by the Court of Appeals for the Seventh Circuit as follows:

> ". . . A frivolous appeal means something more to us than an unsuccessful appeal. We will grant that law may become so clear and well established that persistence in a course could be determinative of bad faith. We simply are saying that we are not so persuaded in the present case. We also bear in mind that notwithstanding the overburdened condition in which the courts now find themselves we would not desire to take action which could become the basis of chilling the assertion of rights reasonably held in good faith by virtue of imposing a penalty because of a failure to prevail in the litigation." *N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551, 555 (7th Cir. 1975).

In the past, the Court of Appeals for the Second Circuit had correctly recognized that the imposition of the sanction of double costs ". . . is highly unusual and requires a clear showing of bad faith on the part of appellants." *State of West Virginia v. Chas. Pfizer & Co.*, 440

F.2d 1079, 1091 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971). However, there has recently arisen a tendency within the Second Circuit for some panels to take upon themselves the liberty of administering punishment upon appellants and their counsel by imposing double costs *sua sponte*, without prior notice and without sufficient basis or explanation of the grounds for finding the appeal to be frivolous or in bad faith.[26]

In the instant case, it appears that the panel was attempting to punish plaintiff for calling attention to the conduct of various participants in the litigation[27] and for

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26. See, *e.g.*, *Green v. Bartholomew*, Docket No. 79-6031 (2d Cir., Jan. 8, 1980, *rehearing denied* Mar. 4, 1980) (in which appellant has applied for an extension of time to petition this Court for a writ of certiorari). In that case, the panel (which included two of the same judges who subsequently imposed sanctions on the petitioner herein) assessed double costs against appellant's counsel and referred him to the Bar Association's Grievance Committee because of the manner in which he criticized defendants' conduct.

27. The Court of Appeals neither identified nor refuted any of the so-called "baseless and unjustified personal and professional attacks" which it alleged were made by plaintiff. Page 20a, *infra*. Nor could it point to any intemperate language contained in plaintiff's briefs on appeal. On the contrary, every statement made by plaintiff has been well-founded and appropriate to the context in which it was made.

The charges against G&W and Bluhdorn of perjury and destruction of evidence came not from plaintiff, but were contained in evidence uncovered by the SEC and reported in the *New York Times*. This evidence reportedly included an affidavit of Joel Dolkart, Esquire—who, at the time of the Tender Offer was a senior partner in Simpson Thacher & Bartlett (counsel for G&W and Bluhdorn); general counsel, secretary, and a member of the executive committee of G&W; an officer, director, and/or counsel for numerous G&W subsidiaries and other companies that G&W or Bluhdorn owned or controlled; and a long-time personal friend and confidante of Bluhdorn. In December 1974, Dolkart was indicted on charges of embezzling $2.5 million and subsequently pleaded guilty to forgery.

allegedly opposing the class action settlement for unspecified "personal reasons." Ironically, the *defendants* are the ones who have, since the beginning of this litigation, pur-

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Plaintiff's motion of December 20, 1976, to add Simpson, Thacher and Bartlett ("Simpson Thacher") and Joel Dolkart, Esquire, as defendants for having aided and abetted the Williams Act violations was in no way aimed at preventing discovery, but was instead prompted by testimony given by none other than Charles G. Bluhdorn at his deposition of November 11, 1976 ("Bluhdorn Dep."). Bluhdorn testified that the Tender Offer was Simpson Thacher's "responsibility from A to Z"; that, at every step on the way, every action taken was the result of Simpson Thacher's advice; and that Simpson Thacher should be the witness, rather than Bluhdorn. Bluhdorn Dep., pp. 610-21.

The participation and knowledge of Simpson Thacher and Joel Dolkart in aiding and abetting the Williams Act violations was further indicated by the fact that Simpson Thacher was counsel for G&W, Bluhdorn, and numerous G&W subsidiaries and other companies which G&W and Bluhdorn owned or controlled—including Bohack Corporation, which was A&P's largest competitor in the New York area at the time of the Tender Offer and a significant factor in the finding of probable anti-trust violations. Said firm also drew up a purported "voting trust agreement" of Bluhdorn's shares in Bohack, which has been characterized as a "sham." *G&W v. A&P, supra*, 356 F. Supp. at 1072.

It is also a matter of record that various officers and directors of G&W and other witnesses close to Bluhdorn have either refused to testify on the grounds of self-incrimination (*e.g.*, Joseph Binder, who was president of Bohack and personal confidante of Bluhdorn at the time of the Tender Offer) or claimed convenient lapses of memory (*e.g.*, G&W's chairman of the board Don Gaston and executive vice-president Martin Davis)—alleging that they "don't recall" what happened at the meeting at which G&W's directors approved what would have been the single largest investment in G&W's history.

The Court, while baldly asserting that "Mr. Lowenschuss' efforts to imply that the settlement negotiations were marked by conflicts of interests are unsupported," failed to note that one of the very issues raised by the appeal was the District Court's refusal to permit examination into the conduct of the settlement negotiations. See *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979).

sued the tactic of making scurrilous, *ad hominem* attacks against the plaintiff as a means of diverting attention from the defendants' own wrongdoing—and then capping their insults with the hypocritical accusation that it was *plaintiff* who was guilty of making "indiscriminate charges." Now the Court of Appeals has simply repeated these attacks, in an attempt to bolster a decision which fails to address the substantive issues on the merits.

## II. The punishment of appellant under Fed. R. App. P. 38, without prior notice or opportunity to be heard, violated his right to due process of law.

In addition to being without justification, the imposition of sanctions under *Rule* 38 came without any notice whatsoever. The appellees themselves had at no time suggested that the appeal was "frivolous", nor did they ever request assessment of double costs under *Rule* 38. At the argument, the Court of Appeals gave no indication that it was considering such sanctions. Consequently, appellant was afforded no opportunity to be heard on the question of whether double costs should be imposed.

Sanctions against appellants, such as those under *Rule* 38, are properly characterized as being in the nature of a "penalty." See, *e.g.*, Advisory Committee Note to Fed. R. App. P. 38; 9 Moore, Federal Practice ¶238.02 (Mar. 1980), *E.B. Deming v. Carlisle Packing Corp.*, 226 U.S. 102, 110 (1912); *N.L.R.B. v. Lucy Ellen Candy Division, supra*, 517 F.2d at 555. Although no cases have been found directly on point, it would seem to follow that an appellant is entitled to at least the minimum requirements of due process—*i.e.*, notice and an opportunity to be heard —before such a penalty is imposed.

This Court has consistently held that reasonable notice and an opportunity to be heard in one's defense before punishment is imposed are basic to our system of jurisprudence. See, *e.g.*, *Hovey v. Elliott*, 167 U.S. 409, 414 (1897); *In re Oliver*, 333 U.S. 257, 273 (1947).[28]

In numerous instances, this Court has reversed the summary conviction of attorneys for contempt, declaring that procedural due process requires that one charged with contempt of court be advised of the charges against him and have a reasonable opportunity to meet them by way of defense or explanation. See, *e.g.*, *In re Green's Petition*, 369 U.S. 689, 691 (1962); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Groppi v. Leslie*, 404 U.S. 496 (1972); *Holt v. Virginia*, 381 U.S. 131 (1965); *Cooke v. United States*, 267 U.S. 517 (1925).

In the present case, the petitioner has been summarily punished by the panel of the Court of Appeals without notice, without an opportunity to be heard on the issue of sanctions, and without an express determination that the legal issues raised by the appeal were "frivolous" or an explanation of how they could possibly be so charac-

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28. Of course, the requirements of due process are not limited to cases involving punishment, but extend to virtually every situation in which action by the government or the courts would deprive a person of property or other protected rights or interests. See, *e.g.*, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Goss v. Lopez*, 419 U.S. 565 (1975); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978). This Court has also held that, "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574 (1972).

terized. In addition, the Court of Appeals has denied petitioner any opportunity for review or rehearing of the panel's decision. The Court of Appeals' imposition of punishment, under these circumstances, was a violation of the meaning and purpose of *Rule* 38 and a denial of petitioner's right to due process of law. Moreover, it appears that this abuse of *Rule* 38 sanctions is not an isolated case, and that supervisory guidelines from this Court are an immediate need.

**III. Besides not being frivolous, plaintiff's appeal raised substantial and meritorious issues which require reversal of the lower court's decision.**

The following is a brief outline of some of the principal issues in this appeal, which are discussed in depth in appellant's Brief and Reply Brief (copies of which are being lodged by petitioner with the Clerk of this Court):

A. ***Did the District Court, in approving the present settlement, err in refusing to consider the issue of whether defendant*** G&W ***had assumed the risk of a preliminary injunction by having intentionally omitted a "litigation out" clause from the Tender Offer, despite*** G&W's ***knowledge of facts creating "a strong likelihood of antitrust litigation" over its acquisition of the*** A&P ***shares, and despite the fact that such injunctions are a foreseeable risk in the making of tender offers (which*** G&W ***itself had previously encountered)?***

As the Court of Appeals noted in the previous appeal, G&W's Tender Offer was written in firm and absolute terms, which became a binding contract upon the

tender of the shares, and contained no provision that would relieve G&W of its obligation to pay for the shares upon the occurrence or non-occurrence of any event. *Lowenschuss v. Kane*, 520 F.2d 255, 264-65 (2d Cir. 1975).[29] The subsequent deposition of Bluhdorn revealed that G&W had in fact considered including a "litigation out" clause to excuse its performance in the event of an injunction or other litigation,[30] but G&W nevertheless consciously chose to omit such a provision. Since G&W has admittedly failed to pay the $20 per share as promised, the plaintiffs have a *prima facie* case against G&W for breach of contract.

As plaintiff has demonstrated at length in his Brief for Appellant, pp. 37-46, and Reply Brief, pp. 11-14, G&W's alleged defense of "impossibility of performance" is barred by the fundamental rule of contract law that "the defense of impossibility is only available where performance is rendered impossible by the happening of an unanticipated event *which could not be foreseen or guarded against in the contract. . . .*" *Ogdensburg Urban Renewal Agency v. Moroney*, 42 A.D.2d 639, 345 N.Y.S.2d 169, 171 (1973) (emphasis added). This rule had been consistently followed by the Court of Appeals and the courts of New York.[31]

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29. An excerpt from the Court of Appeals' prior opinion, as it pertains to the contract claim, appears at Appendix "E," pages 25a through 33a, *infra*.

30. Deposition of Charles G. Bluhdorn, Nov. 11, 1976 (Bluhdorn Dep."), pp. 584-85, 587-88.

31. See, *e.g.*, *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253, 257 (2d Cir. 1960); *Madeirense Do Brasil S/A v. Stutman-Emrick Lumber Co.*, 147 F.2d 399, 403 (2d Cir. 1945); *Companhia de Navegacao Lloyd Brasiliero v. C.G. Blake Co.*, 34 F.2d 616, 619 (2d Cir. 1929); *Standard Oil Co. v. Central Dredging Co.*, 225 App. Div.

It is highly unlikely that G&W could successfully prove, under the circumstances, that the risk of a preliminary injunction against the Tender Offer was "reasonably unforeseeable"—that is, in the words of this Court, "of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made. . . ." *Chicago M. & S.P.R. Co. v. Hoyt*, 149 U.S. 1, 15 (1893).

Indeed, lawsuits by target companies to block tender offers are widely recognized as a familiar defensive tactic.[32] At the time that G&W made its Tender Offer in 1973, a myriad of suits had been brought to enjoin the consummation of various tender offers.[33] In an earlier instance, even one of G&W's own previous tender offers had been the subject of a temporary injunction, which had been granted because of G&W's alleged violation of the Clayton

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407, 233 N.Y.S. 279, 282-83 (1929), *aff'd*, 252 N.Y. 545, 170 N.E. 137 (1929); *Ogdensburg Urban Renewal Agency v. Moroney*, 42 A.D.2d 639, 345 N.Y.S.2d 169, 170 (1973); *Frenchman & Sweet, Inc. v. Philco Discount Corp.*, 21 A.D.2d 180, 249 N.Y.S.2d 611 (1964). Accord: *Chicago, M. & S.P.R. Co. v. Hoyt*, 149 U.S. 1, 14-15 (1893); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-92 (5th Cir. 1976); *United States v. Buffalo Coal Mining Co.*, 345 F.2d 517, 518 (9th Cir. 1965); *Inter-Coast S.S. Co. v. Seaboard Transp. Co.*, 291 F. 13 (1st Cir. 1923).

Reference is made herein to New York state law, that being the state where the Tnder Offer was made, where the tendered shares were received and held by G&W's depository, and where defendants' conduct took place.

32. See the observations of the Court of Appeals in *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 209-10 (2d Cir. 1973); and *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 854 (2d Cir. 1974). See also, Aranow & Einhorn, Tender Offers for Corporate Control, p. 266 (1973).

33. Appellant's Brief, pp. 43-44, n.47, gives no less than 14 citations as but a partial listing of such reported cases that had been instituted prior to G&W's Tender Offer.

Act. *Muskegon Piston Ring Co. v. Gulf & Western Industries, Inc.*, 328 F.2d 830 (6th Cir. 1964).

The Court of Appeals has previously found that the circumstances surrounding G&W's Tender Offer for A&P shares gave rise to "a strong likelihood of antitrust litigation" at the time G&W made its Tender Offer,[34] and that the record demonstrated a "probability of A&P's success on the merits" in proving antitrust and securities law violations by G&W in making the Tender Offer.[35] Furthermore, Bluhdorn has testified that G&W had in fact considered including a "litigation out" clause to excuse its performance in the event of an injunction or other litigation.[36] Since G&W consciously chose to omit such a provision, the courts cannot supply it by implication. *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253, 257 (2d Cir. 1960).

The above-mentioned precedents, facts, and previous findings of the Court of Appeals were interpreted by plaintiff, in good faith, to indicate clear contractual liability on the part of G&W, which the District Court should not have ignored. Consequently, it appears that the District Court's evaluation of the most important factor to be considered—the likelihood of success on the merits—was drastically in error, requiring a reversal of the District Court's approval of the present settlement.

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34. *G&W v. A&P*, *supra*, 476 F.2d at 697.

35. *Id.*, at 694-97.

36. Bluhdorn Dep., pp. 584-85, 587-88. Bluhdorn further testified that G&W's lawyers had researched the antitrust implications of the Tender Offer and that, at the time of the Tender Offer, Bluhdorn personally had reservations as to whether there were any antitrust problems. *Id.*, pp. 553-54.

B. ***Did the District Court, in approving the present settlement, err in holding that plaintiffs would have the "very heavy burden" of defeating defendant's defense of impossibility, which "would be extremely difficult to carry," rather than placing on defendant the burden of proving impossibility and lack of foreseeability as an affirmative defense?***

The District Court's denigration of the class' likelihood of success was based primarily on its view that the class would have to carry a "very heavy burden" of defeating G&W's defense of impossibility, by proving that G&W's fault contributed to the issuance of the preliminary injunction. However, as discussed at length in appellant's Brief, p. 39, and Reply Brief, pp. 5-11, this view was clearly erroneous.

It is a fundamental rule that "the burden of establishing the nature, extent and causative effect of the alleged impossibility is invariably held to be upon the party asserting it." 18 Williston on Contracts, §1978B, at 272. In order to establish the defense of impossibility, G&W must prove that its performance was rendered impossible by "facts that [the] promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault. . . ." Restatement of Contracts, §457.

In order for G&W to prove its affirmative defense of "impossibility of performance," G&W must first meet its burden of proving that the alleged frustrating event (here, the preliminary injunction) was not reasonably foreseeable at the time that the contract was entered into.[37] Since, as

37. See, *e.g.*, *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 990-92 (5th Cir. 1976); *Ocean Air Tradeways, Inc. v. Arkay Realty Corp.*, 480 F.2d 1112, 1117 (9th Cir. 1973); *Iowa Electric Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 132-

previously discussed, there is no reasonable likelihood that G&W could meet this burden, the question of "fault" would never even have to be reached.

Furthermore, the weight of authority in the United States indicates that the burden would also be on G&W to prove its *freedom* from contributing fault—and not upon the class to prove the existence of fault.[38] Although the Court of Appeals' opinion cites 6A Corbin, Contracts, §1329 at 350-353 (1962), for the proposition that the class would have the burden of proving fault, said treatise is actually quite equivocal on the subject. It cites only a single English case[39]—and *no American cases*—which would place that burden on plaintiff. Furthermore, Professor Corbin has expressed doubt as to the value of that case as precedent, stating:

> ". . . it is not safe to predict that it will be followed in all cases of impossibility and frustration. . . . It would be quite reasonable for the court to put upon the defendant the burden of alleging and proving the facts creating impossibility of performance. . . . This is because those facts are more readily known to the

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34 (N.D. Iowa 1978); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 438 (S.D. Fla. 1975); *Garner v. Ellingson*, 18 Ariz. App. 181, 501 P.2d 22, 24 (1972); *Gold v. Salem Lutheran Home Ass'n*, 53 Cal.2d 289, 1 Cal. Rptr. 343, 347 P.2d 687, 689 (1975); *Lloyd v. Murphy*, 25 Cal. 48, 153 P.2d 47, 50 (1944).

38. See, *e.g.*, *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, *supra*, 532 F.2d at 990; *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E.2d 292, 294 (1965); *Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E.2d 225, 228 (1961); *Sale v. State Highway & Public Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290, 298 (1955); *Canadian I.A. Co. v. Dumbar M. Co.*, 258 N.Y. 194, 198-99, 179 N.E. 383, 384 (1932).

39. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154, 1 All Eng. 165.

defendant and provable by him. . . ." *Id.*, §1329 at 352.

In view of the overwhelming precedents cited by plaintiff, it is clearly G&W—and not the class—that must bear a "heavy burden of proof." Furthermore, any attempt by G&W to prove that it was not in contributing fault is likely to be particularly difficult and embarrassing, in view of the fact that its own witnesses have hidden behind the Fifth Amendment and have claimed to have convenient lapses of memory at their depositions.

### C. *Did the District Court, in approving the present settlement, err in estimating the measure of contract damages to be merely the difference between the tender offer price and the market price of the shares at the time they were delivered to defendant, without also including the amount by which said shares declined in market price before being returned by the defendant to the plaintiffs?*

Section 8-107(2) of the New York Uniform Commercial Code ("N.Y. UCC") expressly provides that a seller who has delivered or tendered securities pursuant to a contract of sale, for which the purchaser wrongfully fails to pay, may recover (as an alternative to any other remedy) *the agreed price of the security.*[40] See *Bache & Co. v. International Control Corp.*, 339 F. Supp. 341, 348-49 (S.D.N.Y.), *aff'd*, 469 F.2d 696 (2d Cir. 1972).

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40. The text of N.Y. UCC §8-107(2) appears at Appendix "D," *infra*, p. 24a. Other alternative remedies of sellers for breach are set forth in N.Y. UCC §§2-706, 2-708(2), and 2-709—all of which would take into account the decline in market value while G&W held the tendered shares. See appellant's Brief, pp. 47-49, and Reply Brief, pp. 14-20.

Plaintiff has estimated that this would result in a contract damages of at least $6.67 per share, based on the difference between the Tender Offer price of $20.00 and a market price of $15.00 or less when the A&P shares were released from G&W's depository on March 14, 1973, plus estimated brokerage fees and interest (Joint Appendix, p. A862).[41] Milton Paulson, Esquire, has agreed that the correct measure of damages would be somewhere between $6.00 and $8.00 per share, based on the aforesaid differential, with total damages in the area of $30 million (*id.* at A1529).

The District Court, however, totally disregarded this express statutory remedy in its evaluation of the proposed settlement, and limited its estimate of the class' potential recovery to "the difference between the market price at the time and place for tender [$18.15 to $18.50] and the unpaid contract price [$20.00]" as set forth in Section 2-708(1), thereby suggesting that the contract damages would only be $1.50 to $1.85 per tendered share (page 89, *infra*).

Under the specific facts of this case, this is by far the *least* appropriate measure of damages, because it does not account for the fact that G&W held the shares for one month or more after delivery and did not release or return them until after their market price had fallen to at least $5.00 below the contract price.

Neither the appellees, the District Court, nor the Court of Appeals have come forth with any justification on the merits for limiting a seller's recovery to Section 2-708(1) under such circumstances, but have merely attempted to

41. When multiplied by the 1,130,000 shares for which claims have been filed, this would result in an aggregate recovery for the class (excluding Carpenter) of at least $7,537,100.00.

rely on certain "dicta" contained in the Court's previous opinion in *Lowenschuss v. Kane*, 520 F.2d 255, 267 (2d Cir. 1975). The Court of Appeals has now characterized that earlier opinion as indicating that "damages would likely be the difference between the tender price and the market price on the date of tender. . . ." See p. 18a, *infra*. Actually, the previous opinion had *expressly refrained* from deciding the issue of damages, other than to point out that contract damages were available to the class. Both the words and context indicated that Section 2-708(1) had been cited merely *as an example* of the damages cognizable at law, and *not* as any limitation of the remedies expressly available to the class under the N.Y. UCC. See pp. 32a-33a, *infra*.

As pointed out in Appellant's Brief, pp. 47-49, and Reply Brief, pp. 14-20, the measure of damages in Section 2-708(1) is simply not designed for a situation where the buyer takes delivery of securities without paying and does not return them until after they have substantially declined in market value. Any rule making that subsection the exclusive remedy in such a case would cause an unconscionable injustice, and would wreak havoc on the securities markets.

Furthermore, there is no doubt that G&W—a multibillion dollar conglomerate—could easily withstand a judgment for the full measure of damages claimed on behalf of the class.[42] At the time of the Tender Offer, G&W had been prepared to expend $78 million of its own funds to acquire the A&P shares (Joint Appendix, A108). It is ironic to note that, if G&W had been permitted to consummate

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42. The District Court readily agreed with plaintiff that G&W is financially able to pay far more than the present settlement. Appendix "A", p. 10a, *infra*.

its Tender Offer at $20.00 per share (and had been purchasing solely "as an investment" as represented), G&W would have by now suffered a loss of $14.25 per share, based on the closing price of $5.75 per share at the end of 1978.[43] In this respect, G&W has saved more than $53 million simply by not consummating the Tender Offer (*id.* at A868), and has shifted this loss onto the tendering shareholders.

D. ***Did the District Court err in refusing to enforce the prior settlement of June 20, 1977 as against defendants G&W and Bluhdorn in the sum of $4,359,376.00 (plus interest at the prime rate from June 1, 1977)?***

Although this appeal is first and foremost an appeal from the District Court's approval of the present settlement, plaintiff-appellant also sought to preserve for review an Order of January 24, 1978 (Joint Appendix, p. A655), denying a motion by Milton Paulson, Esquire, on behalf of plaintiff-intervenor Rachel Carpenter, to compel consummation of the prior settlement of $4,359,376.00, plus interest, to which G&W and Bluhdorn had agreed on June 20, 1977.[44] Mr. Paulson prematurely attempted to appeal this same order to the Court of Appeals, under Docket No. 78-7082; however, the appeal was dismissed as interlocutory on April 7, 1978. No one has ever suggested that said appeal was in any way "frivolous," nor were Paulson or Carpenter ever assessed double costs.

Plaintiff's position as to the facts surrounding the prior settlement remains exactly the same as at the hearing on

43. As of June 9, 1980, the closing price of A&P was $5.00 per share, which would have increased G&W's loss to more than $56 million.

44. See appellant's Brief, pp. 15-19, 27-30.

said settlement before the District Court. Although plaintiff did not originally believe that the facts gave rise to a binding settlement as a matter of law, he was subsequently persuaded by the authorities cited by Mr. Paulson in the previous appeal, and by further legal research, that the facts did indeed constitute a legally binding settlement.

Consequently, plaintiff felt it reasonable to preserve this issue for review. Were the Court of Appeals to have overturned the present settlement of $1.2 million and ordered that the previous settlement of $4.36 million plus interest should have been consummated, the class' recovery would have been increased threefold, without the need for any further litigation.

**IV. In proceedings to determine the fairness of a proposed class-action settlement reached by a non-representative class member under irregular circumstances, the District Court should have permitted examination of the conduct of the settlement negotiations, so as to provide a basis for determining whether the class received adequate representation.**

As previously discussed, the present settlement was reached during a crucial period after plaintiff's disqualification, while the class had no representative who could litigate its claims. The settlement was negotiated with a non-representative class member (McIntosh) against whom the defendants were asserting individual defenses not applicable to the class, who had expressed no desire to participate actively in the litigation except for the purpose of settlement, and who was able to increase its own settlement with G&W from $.60 per share to $.94 per share simply by settling on behalf of the class.

Another major participant was Milton Paulson, Esquire, whose client, Rachel Carpenter, had already agreed to a separate settlement of $600,000.00 (approximately $.30 per share) because of infirmities peculiar to herself. Carpenter was seeking to abandon her role as class representative, to dismiss her claim, and to consummate her separate settlement as quickly as possible, but could not do so until the claims of the class were settled or until a new class representative was appointed.

Meanwhile, plaintiff and his former counsel, Arnold Levin, Esquire, were viewed by the Court and the other participants as being in a mere "lame duck" capacity, and neither were permitted to participate in any effective way on behalf of the class. Although Levin ultimately joined in the stipulation of settlement, he was at that time an attorney without an individual client and with no future as class counsel.

The integrity of the settlement negotiations was therefore seriously compromised by the absence of effective representation of the class. If for no other reason, the settlement should have been rejected because of said inadequate representation. In fact, the entire circumstances of the present settlement evidence a blatant disregard for what one commentator has called the "integrity of the negotiating process." See Haudek, "The Settlement and Dismissal of Stockholders' Actions," 23 Sw.L.J. 765, 771 (1969).

The present settlement by itself manifests the failure in the "integrity of the negotiating process" that produced it. This is evidenced not only by measuring it against the true value of the class' claims (at least $6.67 per share), but also by comparing it with the previous settlement of

$4,359,376.00 plus interest, which G&W had agreed to pay in June 1977—only a year earlier.

The present settlement would provide payments to the class of approximately $1,212,200.00, not including the $600,000.00 already paid to Carpenter. G&W's total payments would thus come to approximately $1,812,200.00. Thus, the total payments that G&W would make under the present settlement would be less than 42 per cent of the amount of the settlement only a year before (and only about one-third the amount of the prior settlement and its accrued interest)—despite the fact that plaintiffs' claims on the merits remained as strong as ever (or stronger).

The importance of the integrity of the negotiation process was recently reaffirmed by the Court of Appeals for the Seventh Circuit in *In Re General Motors Corporation Engine Interchange Litigation* ("GM Litigation"), 594 F.2d 1106 (7th Cir. 1979). In that case, the Court of Appeals reversed the approval of a class-action settlement, because the District Court had refused to permit discovery or cross-examination into the negotiating process which led to the settlement. *Id.*, at 1124-26, 1126 n.30, 1131.

At the hearing on the settlement in the present case, the District Court refused to permit the taking of any testimony whatsoever into the integrity of the negotiating process (Joint Appendix A1489-93). This refusal to permit inquiry into the questionable circumstances surrounding the present settlement is itself grounds for reversing the District Court's approval of the settlement. However, the Court of Appeals for the Second Circuit not only failed to address plaintiff's serious arguments based on the *GM Litigation* decision, but on the contrary, punished the plaintiff for as much as calling attention to the issue.

## CONCLUSION

By means of a grossly inadequate settlement, negotiated with a non-representative party after the elimination of effective class representation, the defendants have been permitted to compromise a claim originally valued at $30 million for a total of only $1.8 million (or $1.2 million, excluding Carpenter). This present settlement is only 16 per cent of the contract damages sustained by those class members (excluding Carpenter) who have filed claims, and only 42 per cent of the amount of a previous settlement that had been negotiated with G&W and Bluhdorn only one year earlier.[45] In addition, defendant G&W has already saved more than $53 million simply by not consummating its Tender Offer.

The record in this case shows that G&W was clearly liable to the class under well-established contract law, that there was a substantial likelihood that G&W and Bluhdorn had violated the antitrust laws and the Williams Act (as previously determined by the Court of Appeals), that Bluhdorn had reportedly committed perjury and caused the destruction of important evidence regarding the Tender Offer, that various officers and directors of G&W and other witnesses close to the Tender Offer have either claimed lack of memory or invoked the privilege against self-incrimination, and that G&W's counsel was deeply involved in the Tender Offer and the alleged violations. However, G&W, Bluhdorn, and the other aiders and abettors have not been required to pay for this wrongdoing, or even to defend themselves on the merits.

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45. Or less than one-third of the previous settlement, including the accrued interest thereon.

Instead, the Court of Appeals' recent opinion in effect whitewashes the defendants' activities—by attempting to discredit and punish the plaintiff for having had the temerity to call attention to the wrongs committed. In view of the obvious substance and merit of the issues raised by plaintiff on appeal, the imposition of such punishment is a clear abuse of Rule 38 of the Federal Rules of Appellate Procedure.

For the above reasons, the Petition for Writ of Certiorari should be granted, so that this Court may exercise its power of supervision by vacating the imposition of double costs and by setting forth guidelines as to the proper criteria and procedure for the application of Rule 38, as well as reviewing the appeal on the merits and reversing the courts below.

Respectfully submitted,

/s/ William D. Parry
WILLIAM D. PARRY,
*Counsel for Petitioner*

# APPENDIX A

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan,

*Plaintiff,*

and

RACHEL C. CARPENTER,

*Plaintiff-Intervenor,*

and

THE McINTOSH FOUNDATION,

*Plaintiff-Intervenor,*

against

C. G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

*Defendants.*

And two related cases, 73 Civ. 2931 and 76 Civ. 3557

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## MEMORANDUM

(Filed June 14, 1979)

BONSAL, D.J.

After six years of litigation, the Court is asked to approve a proposed settlement of this class action as fair, reasonable, and adequate. Pursuant to the notice to the class, a hearing was held on January 16, 1979 at which the only objection to the settlement was made by plaintiff Lowenschuss.

## BACKGROUND OF THE LITIGATION

On February 2, 1973, Gulf & Western Industries, Inc. ("G&W") made a tender offer to purchase 3,750,000 shares of common stock of Great Atlantic & Pacific Tea Co., Inc. ("A&P"), representing about 15 percent of A&P's outstanding shares, at $20 per share. A&P issued a press release opposing the tender offer. In response to G&W's offer, 3,806,769 shares of A&P were tendered to G&W. On February 5, 1973, G&W sued A&P on the ground that A&P's press release was inaccurate and violated the Williams Act, §14 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78n. A&P counterclaimed seeking preliminary injunctive relief against G&W on the ground that the tender offer violated §14 of the 1934 Act, as amended, and that the consummation of the tender offer would violate the antitrust laws. Section 1 of the Sherman Act, 15 U.S.C. §1 (1970) and section 7 of the Clayton Act, 15 U.S.C. §18 (1970). On February 13, 1973, the District Court (Duffy, J.) issued a preliminary injunction enjoining the tender offer, *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co.*, 356 F. Supp. 1066 (S.D.N.Y. 1973), which was affirmed by the Court of Appeals on March 12, 1973. 476 F.2d 687. On March 14, 1973, G&W allowed tendering A&P shareholders to withdraw their shares. On July 25, 1973, G&W withdrew the tender offer.

The class action was brought by Fred Lowenschuss ("Lowenschuss"), as Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all common stockholders of A&P who tendered their shares of common stock to G&W pursuant to the terms of the tender offer announced by G&W.

Lowenschuss instituted this action on February 15, 1973 in the United States District Court for the Eastern District

of Pennsylvania. On April 2, 1973, the action was transferred to this district and assigned to Judge Duffy. On July 25, 1973, Judge Duffy granted plaintiff's motion to have the action designated a class action and granted summary judgment to the defendants dismissing the complaint on the merits. 367 F.Supp. 911. Judge Duffy held that the preliminary injunction issued at the request of A&P made the consummation of the tender offer impossible which was not the fault of G&W and that plaintiffs had sustained no damages since the plaintiffs' A&P shares had been returned.

On May 27, 1975, the Court of Appeals reversed the district court holding that there existed material issues of fact with respect to the possible breach of contract and violation of the Williams Act by G&W which precluded the granting of summary judgment. 520 F.2d 255.

On May 7, 1976, the case was reassigned to this Court and thereafter class action certification was granted as to the contract claims and the Williams Act claims, §§14(d) and 14(e) of the Securities Act of 1934, 15 U.S.C. §§78n(d) and 78n(e). The class consisted of A&P common stockholders who tendered their shares in response to the G&W tender offer announced on February 2, 1973. The breach of contract claim alleged that the tender offer formed a binding contract between G&W and the tenderor under the terms of the tender offer and alleged that G&W was not relieved of its obligation under the offer by reason of the Court injunction since such injunction resulted from the fault of G&W. The Williams Act claim alleged that defendants G&W and Bluhdorn, Chairman of the Board of G&W, omitted material facts in the tender offer which defendants knew or should have known were necessary to make it not misleading, such as (1) that it was G&W's intention to control A&P or at least exercise influence over

A&P's management and policies, (2) that A&P would likely oppose the tender offer, and (3) that G&W had holdings in other companies which rendered it likely that its acquisition of the A&P stock would result in violation of the antitrust laws by both companies. Plaintiff also alleged that defendant Kidder, Peabody & Co. aided and abetted Bluhdorn and G&W and that there was a conspiracy among the defendants to gain control of A&P.

On June 1, 1976, the Court granted Rachel C. Carpenter's ("Carpenter") motion to intervene in the action. Carpenter had tendered 1,957,012 shares of A&P common stock representing about 55% of the shares tendered.

In the Spring of 1977, Lowenschuss, co-class counsel Milton Paulson ("Paulson"), Carpenter's counsel, and Arnold Levin ("Levin"), Lowenschuss' counsel, entered into settlement negotiations which culminated in a settlement proposal in the amount of approximately $4,360,000 of which $1,250,000 would have been paid to Carpenter (approximately $.64 per share) and the remaining amount to the other members of the class to be distributed as follows: (1) all tendering shareholders (other than Carpenter) to divide $1,746,339 (approximately $.95 per share), (2) all persons who bought A&P shares after the public announcement of the G&W tender offer and then tendered to divide an additional $861,000; and (3) those persons who held A&P shares before the tender offer and could prove that they would have sold their shares at a particular time and price while their shares were frozen during the Court proceedings from February 14 to March 13, 1973 to receive an additional $.28 per share up to an aggregate maximum of $502,037. The negotiations broke off in June, 1977. Although Carpenter (supported by the McIntosh Foundation) sought to compel consummation of this settlement on the grounds that there had been a settlement

reached before the negotiations broke down, the Court, following an evidentiary hearing on January 23 and 24, 1978, denied the motion, finding that no settlement had been entered into.

Meanwhile, on September 12, 1977, defendants moved to disqualify Lowenschuss as class representative and Levin as class counsel. By memorandum order of April 20, 1978, this Court granted defendants' motion, holding that Lowenschuss had evidenced a conflict of interest with the class.

In the Spring of 1978, G&W suggested a proposed settlement to the class whereby G&W would pay approximately $.30 per tendered share. This offer was rejected by class counsel.

On July 31, 1978, the parties entered into the present settlement agreement.

On September 14, 1978, the Court appointed the McIntosh Foundation, which had tendered 200,000 shares of its A&P stock to G&W, class representative to succeed Lowenschuss, and Barrett Smith Schapiro Simon & Armstrong ("Barrett Smith") were appointed co-class counsel with Paulson.

On October 26, 1978, the Court approved the notice to the class of the proposed settlement and fixed January 16, 1979 as the hearing date.

Carpenter had entered into a stipulation of settlement with G&W pursuant to which G&W paid $600,000 (approximately $.30 per share) for a private settlement of her claim against G&W and her action was dismissed on November 21, 1978.

On January 10, 1979, Lowenschuss, the original class representative, filed a notice of intention to appear at the hearing and a statement of objections to the proposed settlement. Lowenschuss appeared at the hearing in support of his objection. No other objections were made.

## THE PROPOSED SETTLEMENT

The stipulation of settlement of July 31, 1978 was entered into by Levin, former class counsel for Lowenschuss, Paulson and Barrett Smith, present class counsel, Mordecai Rosenfeld, counsel for two individual members of the class, and Simpson Thacher & Bartlett ("Simpson Thacher"), counsel for defendant G&W. The total amount offered by G&W was $1,750,000 or $.94 for each A&P share properly tendered and for which a proof of claim and release is submitted and approved. G&W is to be liable only for that amount (up to $1,750,000) for which proofs of claim are actually submitted and approved, any amount unclaimed by the class to remain with G&W. The original date for filing of proofs of claim and releases was January 30, 1979 and was extended to May 15, 1979. The proposed settlement originally contemplated that attorneys' fees and disbursements on behalf of the class would be deducted from the settlement. On May 30, 1979, the proposed settlement was amended to provide that G&W would contribute up to $150,000 toward attorneys' fees and disbursements as approved by the Court.

## THE HEARING

At the January 16, 1979 hearing, class counsel, Barrett Smith and Paulson, former class counsel for Lowenschuss, Levin, and G&W's counsel, Simpson Thacher, supported the proposed settlement as being fair, reasonable, and adequate.

Plaintiff Lowenschuss alone objected to the settlement, contending, inter alia, that there was a substantial likelihood of success, that the proposed amount of $.94 per share was inadequate, that there had not been adequate discovery, and that defendants were able to withstand a greater judgment.

## DISCUSSION

In order to approve this settlement, this Court must determine that it is fair, reasonable, and adequate to the absent class members. See, *City of Detroit v. Grinnell Corp.*, 495 F2d 448 (2d Cir. 1974). *Beecher v. Able*, 72 F.R.D. 518 (S.D.N.Y. 1975). In order to make this determination, the Court is to determine the likelihood of establishing liability and the consequent probable reward in damages, balanced against the amount offered in settlement. *Bonwit v. Doyle*, 416 F. Supp. 1372 at 1379 (S.D.N.Y.) 1976, aff'd 556 F.2d 554 (2d Cir. 1977), citing *State of West Virginia v. Charles Pfizer & Co.* 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d at 1079 (1971) *cert. denied sub nom, Catler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

As to the first factor, the likelihood of establishing liability, there appears to be serious questions in establishing both the contract and Williams Act claims.

In reversing the grant of summary judgment in favor of defendants, the Court of Appeals found that the tender offer constituted "a binding contract between G&W and the tenderor." 520 F.2d 255 at 265. However, the Court noted that the defendant G&W's claim of impossibility was an issue of fact to be determined at trial. 520 F.2d 255 at 265-66. Moreover, the Court indicated that in order to defeat defendant's defense of impossibility, the plaintiff

would have to establish that defendant made the tender offer *knowing* that antitrust problems would result from its consummation. 520 F.2d 255 at 266. This would present a very heavy burden, and in view of the passage of time would be extremely difficult to carry.

Turning to the Williams Act claim, the Court of Appeals stated that "mere allegation of proof of omissions from G&W's tender offer statement will not state a claim under §14(e); plaintiff must establish culpability on the part of the defendants, (citations omitted), and the materiality of the alleged omissions, (citations omitted)." 520 F.2d 255 at 268. This also places a very heavy burden on the plaintiff.

Even if liability were established at trial, there remains the measure of damages, *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039; *Bonime v. Doyle, supra.*

With respect to the contract claim, the Court of Appeals suggested that the amount of recovery would be " 'the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . .' N.Y. Uniform Commercial Code §2-708(1), McKinney's Consol. Laws, c. 38." 520 F.2d 255 at 267. This would amount to the difference between the tender price of $20 per share and the market value at the time of the tender which ranged from $18.15 to $18.50 or $1.50 to $1.85 per tendered share, as compared to $.94 per tendered share offered in settlement.

With respect to the Williams Act claim, plaintiff must also establish damage as a result of defendant's violation. G&W offered to purchase A&P stock at $20 per share and it is not disputed that it could have paid this amount. While the tender offer was outstanding, A&P stock sold

between $18.15 to $18.50 per share. During the years following defendant's withdrawal, the price of A&P stock has declined to about $7.75 per share.* Therefore, had it not been for the attack by A&P, presumably the tender offer would have been completed and the tendering stockholders would have received $20 per share. If they had, they would not have been concerned with possible antitrust problems or possible violations of the Williams Act. This points up the very serious problem the plaintiff would have if this case went to trial since to recover damages, plaintiff would have to prove that G&W misled the tenderors with regard to the antitrust problems and that the tenderors relied on G&W's misrepresentations. Furthermore, the Court of Appeals stated that "[t]o recover anything [under the Williams Act claim] the class members must assume the burden of proving with reasonable certainty, (citation omitted), that they would have sold their shares at a particular price or time if the shares had not been frozen." 520 F.2d 255 at 269. (Referring to February 14 to March 13, 1973 when the shares were frozen by Court proceedings.) After six years, it is unlikely that many class members could make such a showing.

Given the substantial litigation risks, the uncertainty in the amount of damages and counsel's own estimate of the evidence, this Court cannot say that the likelihood of establishing liability and the consequent probable reward in damages would be substantially more than the amount offered in settlement.

As to Lowenschuss' suggestion that there has not been sufficient discovery, the Court is satisfied that the discovery heretofore taken and the record of the antitrust action brought by A&P against G&W is sufficient for the purpose. *See, City of Detroit v. Grinnell Corp., supra.*

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* New York Times, June 12, 1979, p. D8, col. 1.

As Lowenschuss suggests, there is no doubt that defendant is financially able to pay far more and that this is a factor to be considered. *City of Detroit v. Grinnell Corp., supra.* However, standing alone, this will not defeat approval of the settlement.

## CONCLUSION

In view of the foregoing, the settlement is approved as fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). The Court will retain jurisdiction in order to fix plaintiff's attorneys' fees and disbursements.

Settle Judgment on Notice.

/s/ Dudley B. Bonsal
DUDLEY B. BONSAL
U.S.D.J.

Dated: New York, N.Y.
June 14, 1979.

# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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Filed June 26, 1979

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan,

*Plaintiff,*

–and–

RACHEL C. CARPENTER,

*Plaintiff-Intervenor,*

–and–

THE McINTOSH FOUNDATION,

*Plaintiff-Intervenor,*

–against–

C. G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

*Defendants.*

And two related cases, 73 Civ. 2931 and 76 Civ. 3557

## ORDER AND JUDGMENT

Notice of the pendency of this action and of the proposed settlement and of a hearing and opportunity to be heard with respect to the Court's consideration of the proposed settlement having been given to the class members as directed by this Court's order of October 26, 1978; and

This action and the two related cases being subject to a Stipulation of Settlement dated July 31, 1978 as amended by letters dated October 19, 1978 and June 18, 1979; and

This action and the two related cases having come before the Court for hearings on January 16, January 31, March 14, May 23 and May 30, 1979, the Honorable Dudley B. Bonsal, United States District Judge, presiding, to determine whether the proposed settlement of this class action is fair, reasonable, and adequate and should be approved; and

All persons present at these hearings having been given an opportunity to be heard; and the respective attorneys for the class and for the defendants having been heard in support of the said settlement, and the objector and his attorneys having appeared in opposition thereto; and

The Court having fully considered all papers submitted to the Court in connection with the proposed settlement, and all matters raised and all exhibits received in evidence at the hearings, and the Stipulation of Settlement and other papers and documents related thereto, and, after due deliberation, having rendered an Opinion, dated June 14, 1979, approving the settlement of this action as fair, reasonable and adequate, denying all objections that were raised, and retaining jurisdiction in order to fix plaintiff's attorneys' fees and disbursements;

IT IS HEREBY ORDERED AND ADJUDICATED THAT:

1. The parties have fully complied with Rule 23 of the Federal Rules of Civil Procedure, and due and adequate notice of the pendency of the action, the settlement, and the applications for attorneys' fees and disbursements; and the hearing and opportunity to be heard thereon was given; and full opportunity to be heard at the hearing was afforded to the parties, to objectors, and to all other persons in interest.

2. The Stipulation of Settlement dated July 31, 1978, as amended by letters dated October 19, 1973 and June 13, 1979 (copies of which are annexed hereto as Exhibits A, B and C), the terms and conditions of which are expressly incorporated herein, is approved as fair, reasonable and adequate.

3. The settlement embodied in the Stipulation of Settlement shall be consummated in accordance with its terms and provisions as amended.

4. This action is hereby dismissed on the merits, without costs to any party, and with prejudice to the plaintiffs herein and to each and every member of the plaintiff class as to any and all claim or claims asserted in any of the complaints for the actions brought under Index Nos. 73 Civ. 2021, 73 Civ. 2931 or 76 Civ. 3557 or which might have been asserted by reason of or in connection with any of the matters referred to in any of the pleadings in these actions, against any or all of the defendants or any or all of the past or present officers, directors, employees, partners, agents or attorneys of the defendants.

5. The plaintiffs herein and each and every member of the plaintiff class are hereby severally barred and permanently enjoined from the institution and prosecution, either directly or representatively, of any other action asserting any claim alleged in the complaints in these actions

or which might have been asserted by reason of any of the matters referred to in any of the pleadings in these matters.

6. Jurisdiction is hereby reserved by the Court over the award of plaintiff's attorneys' fees and disbursements and over the consummation of the compromise and settlement as provided in the Stipulation of Settlement.

/s/ Dudley B. Bonsal
DUDLEY B. BONSAL
U.S.D.J.

Dated: New York, New York
June 25, 1979

# APPENDIX B

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 444, 645—SEPTEMBER TERM 1979

(ARGUED: DECEMBER 5, 1979 DECIDED: JANUARY 9, 1980)

DOCKET NOS. 79-7566, 78-7267

FRED LOWENSCHUSS,
Trustee for Fred Lowenschuss Associates Pension Plan,

*Plaintiff-Appellant,*

–and–

RACHEL C. CARPENTER,

*Plaintiff-Intervenor-Appellee,*

–and–

THE McINTOSH FOUNDATION,

*Plaintiff-Intervenor-Appellee,*

–against–

C.G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

*Defendants-Appellees.*

Before: Moore, Mansfield, *Circuit Judges,* and *Palmieri, District Judge.*[*]

Appeal from a final order of the District Court for the Southern District of New York, entered on June 25, 1979, by Judge Dudley B. Bonsal approving settlement of a consolidated class action on behalf of stockholders of The Great Atlantic & Pacific Tea Company against Gulf & Western Industries, Inc., and others for damages caused by a February, 1973, tender offer and from various interlocutory orders in the same case.

*Affirmed.*

Per Curiam:

Fred Lowenschuss, Trustee for Fred Lowenschuss Associates Pension Plan, appeals from a final order of the District Court for the Southern District of New York, entered on June 25, 1979, by Judge Dudley B. Bonsal, approving settlement of this consolidated class action on behalf of shareholders of The Great Atlantic & Pacific Tea Company, Inc. (A & P), for money damages allegedly caused by a tender offer made in February, 1973, by defendant-appellee Gulf & Western Industries, Inc. (G & W), for fifteen percent (15%) of the shares of A & P. Upon appeal from an earlier dismissal of the complaint we remanded the case for further proceedings, holding (1) that the claim for breach of contract could be met with the defense of impossibility of performance due to the issuance of a preliminary injunction unless fault on G & W's part contributed to the issuance of the injunction, and (2) that a Williams Act claim, 15 U.S.C. §78n(e), had been stated which, if proven, would entitle plaintiffs to recover losses attributable to their inability to sell their

[*] Of the United States District Court for the Southern District of New York, sitting by designation.

tendered shares in the declining market which followed issuance of the injunction; in order to recover, however, they would have to prove with reasonable certainty that they would have sold their shares during the period when those shares were retained by G & W. See *Lowenschuss v. Kane,* 520 F.2d 255 (2d Cir. 1975).

Lowenschuss also appeals from (1) an interlocutory order entered January 24, 1978 denying a motion to compel consummation of an alleged earlier 1977 agreement to settle the action for approximately $4.6 million, (2) an interlocutory order entered on June 21, 1978, striking class allegations in two other actions being consolidated (73 Civ. 2931, known as "Lowenschuss II" and 76 Civ. 3557, known as "Lowenschuss III"), (3) certain other interlocutory orders, including an order dated May 2, 1978, which denied without prejudice Lowenschuss' motion to amend the complaint, to add defendants, and to disqualify counsel for G & W and its chief operating officer, C.G. Bluhdorn, and which disqualified Lowenschuss as class representative, and an order dated September 14, 1978, substituting the McIntosh Foundation as class representative.

After careful review of the record and briefs and after hearing oral argument, we are satisfied that in approving the settlement Judge Bonsal did not abuse his discretion, which is the test on this appeal. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied,* 409 U.S. 1039 (1973). Indeed the Stipulation of Settlement, which is acceptable to all class members appearing in the case except Lowenschuss, would enable class members to recover as much as they could reasonably have expected after a trial. Further litigation of the claims would probably be expensive and protracted because of the

complex facts and issues presented. There was a substantial risk that the class might recover nothing, since it might be unable to sustain its burden of demonstrating that G & W contributed to the issuance of the injunction that rendered performance impossible, see 6A Corbin *Contracts* §1329 at 350-353 (1962). Additional problems of proof would be faced in prosecution of the Williams Act claims, particularly in the case of arbitrageurs who bought for the purpose of tendering, and might have difficulty invoking the Williams Act. See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); 2 Bromberg, Securities Law: Fraud—SEC Rule 10b-5 §6.3(121) (1977). Even if the class succeeded in establishing liability, the amount of recovery was uncertain in view of our earlier indication that damages would likely be the difference between the tender price and the market price on the date of tender (although appellant claims that a more generous measure would be appropriate).

Nor is there any merit to Lowenschuss' claim that a settlement for a higher sum had been negotiated in 1977. Indeed Lowenschuss, both in testimony and affidavits, swore at the time that no such settlement had been reached. After a full hearing, Judge Bonsal reluctantly agreed. The record indicates that the failure to consummate the earlier proposed settlement was largely attributable to Lowenschuss' refusal to release Kidder, Peabody & Co., Incorporated and his avaricious efforts to insure payment to himself of grossly excessive counsel fees out of all proportion to the services allegedly rendered by him (see Memorandum Opinion of Judge Bonsal, April 20, 1978, at p. 6). Lowenschuss' opposition to the settlement finally negotiated by others appears to be one more tactical effort, for personal reasons, to sabotage an agreement which is in the best interests of the A & P stockholders.

The disqualification of Lowenschuss as class representative and the denial of his motion to add Simpson Thacher and Bartlett (counsel for C.G. Bluhdorn and G & W) as a party defendant were perfectly proper. The questionable professional propriety of Lowenschuss' wearing two hats, one as class representative and the other as class counsel, see *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1090 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976), was confirmed by the disclosure of his May 1976 agreement under which his counsel, Arnold Levin, was "legally bound" not to contest a fee application that might be made by Lowenschuss for approximately $1,950,000 (6,500 hours multiplied by $300 per hour) if the litigation were successful (Appendix on appeal at 298-300), despite the fact that there had been virtually no discovery during his term as counsel (App. 1197-98).

Once Judge Bonsal had disqualified Lowenschuss as class representative, he was entirely correct in denying Lowenschuss' motion to add Simpson Thacher & Bartlett as a defendant, without prejudice to renewal of the motion by new counsel. The record indicates that Lowenschuss' 1977 motion to add Simpson Thacher & Bartlett as a defendant was simply a tactical maneuver designed in bad faith to forestall inquiry into his unethical fee arrangements; the first of the renewed motion papers was executed two business days after a magistrate, on December 9, 1976, at Simpson Thacher & Bartlett's request, ordered Lowenschuss to produce his retainer agreements with counsel (App. 159-70). Lowenschuss had withdrawn an identical attempt some 18 months previously to add the same firm as a defendant. His co-counsel disassociated himself from that motion (App. 958 n.*), and it was clear that the addition in 1977 of a defendant would only serve to delay and protract the case, which had then been pending for approximately four years.

The denial of appellant's motion to disqualify Simpson Thacher & Bartlett as counsel was likewise not only well within Judge Bonsal's discretion but proper under the circumstances, as were Judge Bonsal's decisions to accept McIntosh Foundation as class representative and to strike class allegations in "Lowenschuss II" and "Lowenschuss III." Mr. Lowenschuss' efforts to imply that the settlement negotiations were marked by conflicts of interest are unsupported. They represent the culmination of a pattern of highly improper conduct on his part in making baseless and unjustified personal and professional attacks upon numerous reputable persons involved in the case, including counsel for various parties and district judges.

All of the orders of the district court are affirmed. Pursuant to F.R.A.P. 38 double costs are assessed against plaintiff-appellant Lowenschuss. The Pennsylvania Bar Association is requested to review Mr. Lowenschuss' conduct in this case, see American Bar Association Code of Judicial Conduct, Canon 3B(3), and to take such action as is appropriate.

In view of our disposition of plaintiff-appellant's appeal, it is unnecessary to consider defendant's cross-appeal seeking decertification of the Williams Act class claim and dismissal of the pendent class contract claim.

# APPENDIX C

## ORDERS DENYING PETITION FOR REHEARING IN BANC

## UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of March, one thousand nine hundred and eighty.

FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates Pension Plan,
*Plaintiff-Appellant,*

vs.

THE McINTOSH FOUNDATION,
*Plaintiff-Intervenor Appellee,*

vs.

C. G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,
*Defendants-Appellees.*

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Fred Lowenschuss, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Irving R. Kaufman,
IRVING R. KAUFMAN
Chief Judge

# UNITED STATES COURT OF APPEALS

## SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of March, one thousand nine hundred and eighty.
Present:

HON. WALTER R. MANSFIELD,
HON. LEONARD P. MOORE,
*Circuit Judges.*
HON. EDMUND L. PALMIERI,
*District Judge.*

FRED LOWENSCHUSS, Trustee for
Fred Lowenschuss Associates Pension Plan,
*Plaintiff-Appellant,*

vs.

THE McINTOSH FOUNDATION,
*Plaintiff-Intervenor-Appellee,*

vs.

C. G. BLUHDORN, GULF & WESTERN
INDUSTRIES, INC., and KIDDER,
PEABODY & CO., INC.,
*Defendants-Appellees.*

DOCKET Nos. 78-7266, 78-7267, 79-7566

A petition for a rehearing having been filed herein by counsel for the appellant Fred Lowenschuss

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

# APPENDIX D

## STATUTORY PROVISIONS INVOLVED

Securities Exchange Act of 1934, §14(e), 15 U.S.C. §78n(e):

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

New York Uniform Commercial Code:

§2-708. Seller's Damages for Non-acceptance or Repudiation.—(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of

damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

§8-107(2). Action for Price.—Where, pursuant to a contract to sell or a sale, a security has been delivered or tendered to the purchaser, and the purchaser wrongfully fails to pay for the security according to the terms of the contract or the sale, the seller may as an alternative to any other remedy recover the agreed price of the security. This subsection does not affect the remedy of a seller if the security has not been delivered or tendered.

# APPENDIX E

## RELEVANT EXCERPTS OF PREVIOUS OPINION OF COURT OF APPEALS, AS IT PERTAINS TO CONTRACT CLAIMS

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, Individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc. who are similarly situated,

*Plaintiff-Appellant,*

*v.*

W. J. KANE et al.,

*Defendants-Appellees,*

RACHEL C. CARPENTER,

*Appellant.*

Nos. 497, 498, Dockets 74-2156, 74-2216

United States Court of Appeals,
Second Circuit

Argued Feb. 27, 1975 Decided May 27, 1975

Before MANSFIELD, OAKES and TIMBERS, Circuit Judges.

MANSFIELD, Circuit Judge:

The central issue on this appeal is whether a stockholder who has tendered his shares in response to a tender offer may recover damages from the offeror for failure to consummate the transaction where the failure is attributable to the intervening issuance by the court of a preliminary injunction barring the proposed acquisition. We must also decide whether genuine issues of material fact were presented which precluded summary judgment dismissing the shareholders' complaint.

* * * *

## CONTRACT CLAIM

Turning to the complaint, plaintiff's most clearly defined claim is that G & W's tender offer was a unilateral offer which the class members accepted by tendering their shares, thus creating a binding contract requiring G & W to purchase the tendered shares under the terms of the tender offer. This contract was allegedly breached by G & W when it failed to purchase the properly tendered shares, thereby damaging the plaintiff class.

The tender offer reveals significant support for this position. The offer was in firm and specific written terms, beginning with the unambiguous statement that G & W "hereby offers to purchase 3,750,000 shares of Common Stock" of A & P. There was no requirement that a minimum number of shares be tendered before the obligation to purchase would be triggered nor were there any other terms which would relieve G & W of this obligation upon the occurrence or non-occurrence of any event. The only possible modification of G & W's obligation to purchase was a clause which required that G & W purchase shares on a pro rata basis if more than 3,750,000 were tendered by February 13, 1973. There is no evidence that this clause ever became applicable. In addition, the offer specifically stated that delivery of the Letter of Tender to the Depositary would create an agreement between G & W and the tenderor under the terms of the offer.[7]

7. The fourth subparagraph of paragraph 4 of the published offer provided:

> "The delivery of the Letter of Tender and the acceptance of this Offer will constitute an agreement between the tendering stockholder and G & W in accordance with the terms of this Offer, only when the duly signed Letter of Tender, or a telegram or letter (as provided above) from a member of a national securities exchange or the National Association of Securities Dealers Inc. or a bank or trust company in the United States, is received by the Depositary."

There was no requirement that the tender be accepted by G & W and we cannot imply one. Finally, the offer stated that all shares tendered by February 13, 1973, would be accepted, making the offer irrevocable until that date, see N.Y. General Obligations Law, §5-1109, McKinney's Consol. Laws, c. 24-A.

The view that these events gave rise to a binding contract is supported by respected authority.[8] Williston recites the rule as follows:

> "The terms of the offer generally state that holders of a specified number of shares, or a stated percentage of the stock outstanding, shall agree, before a set date, to sell their stock to the purchaser for a certain price. Acceptance by the owners of the requisite number of shares, in accordance with the terms of the offer, is the condition which must happen before the duty of payment, i.e., of immediate performance, arises. *Upon the fulfillment of the condition, however, the contract is binding and enforceable.*"

8 Williston on Contracts § 948C, at 152 (3d ed. 1964) (footnote omitted) (emphasis added); see R. E. Crummer & Co. v. Nuveen, 147 F.2d 3, 5-6 (7th Cir. 1945); Levenburg v. Merrill, Lynch, Pierce, Fenner & Beane, 334 Mich. 508, 54 N.W.2d 626 (1952). There having been no condition that a minimum number or percentage of shares must be tendered, a binding and enforceable contract arose simply upon tender. Accordingly we find that a binding

8. We do not find it necessary to determine whether New York law or as defendants suggest, federal law applies on this issue. Our research has not revealed any decisions or statutes addressing this problem in either jurisdiction. Accordingly, we will apply the rule developed in other jurisdictions, which appears to be reasonable.

contract between G & W and the tenderor under the terms of the tender offer was created upon proper tender.[9]

Lacking a "litigation-out" clause, G & W, in an effort to avoid the contracts that resulted from the tenders, advances several legal theories for excusing it from performance. First, invoking the doctrine of impossibility, it argues that affirmance of the preliminary injunction made performance of the offer impossible as a practical matter. The district court accepted this argument, finding that the impossibility attributable to the injunction was not caused by G & W.

We agree that the preliminary injunction affirmed by this court probably rendered performance by G & W impossible for all practical purposes. Such an injunction is not in a formal sense final. However, in view of the large amount of time and money usually required to attack it and the consequent tie-up of the offeror's capital, such an attack generally may be viewed as an impractical venture. Thus, we are prepared for present purposes to hold that these circumstances give rise to "impossibility" as that term is defined in the Restatement of Contracts § 454 (1932), which includes "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."

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9. The suggestion by the district court that a tender offer is simply an "offer for an offer," see 367 F.Supp. at 914 n.4, seems to be based upon a misreading of Williston. The section quoted in support, 1 Williston on Contracts § 31, at 82 (3d ed. 1957), deals with advertisements for competitive bids to purchase goods or provide services. That is clearly a different situation from a tender offer, as competitive bidding is more in the nature of an auction sale where bid prices are solicited and only one or a few of the bids tendered can be accepted. Here, on the other hand, G & W did not seek bids for prices for A & P shares but offered to purchase up to 3,750,000 shares at a set price on stated, non-negotiable terms.

G & W's "defense" of impossibility should not necessarily be sustained at this stage in the proceedings, however. Impossibility caused by a judicial order prohibiting performance will excuse a party's performance only if the fault of the party owing performance did not contribute to the order. See Kama Rippa Music, Inc. v. Schekeryk, 510 F.2d 837, 842-43 (2d Cir. 1975); Seedman v. Friedman, 132 F.2d 290, 296-97 (2d Cir. 1942); Frenchman & Sweet, Inc. v. Philco Discount Corp., 21 A.D.2d 180, 219 N.Y.S.2d 611 (1964); Restatement of Contracts §§457 & 458 (1932); 10 N.Y. Jurisprudence §373, at 362 (1960). Here plaintiff contends that the injunction resulted from defendants' own conduct. Resolution of the defense of impossibility requires an examination into the conduct of the party pleading the defense in order to determine the presence or absence of such fault. In all but the clearest cases this will involve issues of fact that must be resolved by the district court only after the parties have had adequate opportunity to investigate and present their evidence.

The present record reveals that the district court improperly resolved or ignored genuine issues of material fact in finding that G & W's fault did not contribute to the issuance of the preliminary injunction. The court found that the possible antitrust violation, which was one reason for the preliminary injunction, could not be attributed to any party's fault, but was simply "the result of the juxtaposition of facts which were not intentionally incurred by defendants." This ignores the real issues as to fault. Although G & W cannot be blamed for the mere existence of facts which would prevent consummation of the tender offer, it may be blamed for making the tender offer with knowledge of facts that would entitle the target company to injunctive relief on antitrust grounds. In that

event knowledge of its vulnerability to injunctive relief would bar G & W from later pleading the resulting injunction as an impossibility defense. The issue of G & W's knowledge in the present case is therefore one of material fact precluding summary judgment. See, e.g., Harwell v. Growth Programs, Inc., 451 F.2d 240, 245 (5th Cir. 1971), cert. denied, 409 U.S. 876, 93 S. Ct. 126, 34 L.Ed.2d 129 (1972).

Similarly, since the injunction was grounded in part upon G & W's failure to disclose its intention to acquire dominance over A & P and its failure to disclose its holdings in other companies which would have indicated that G & W's acquisition of A & P stock was likely to result in antitrust violations, proof that G & W knew of these undisclosed facts would preclude its availing itself of the injunction as an impossibility defense.

The same principles govern G & W's possible interposition of a defense, alluded to by the parties in their briefs, that the tender offer contract was illegal. Under the doctrine of illegality a party to an unlawful bargain cannot recover damages for its breach. Restatement of Contracts §598 (1932). Where the illegality of the bargain, however, arises from facts which are known to one party but are justifiably unknown to the other, an important exception to the rule holds that illegality will not bar a suit by the ignorant party for damages for breach. Restatement of Contracts §599 (1932). Assuming that the bargain here was rendered illegal by reason of facts known to G & W (e.g., the likelihood of antitrust violations) but not reasonably expected to be known to plaintiff, G & W would not be excused from performance by reason of illegality.

To resolve the issues of impossibility and illegality, plaintiff is entitled to his day in court. It was error for

the district court to hold that plaintiff's mere knowledge of the institution of litigation before tender amounted to knowledge of the actual facts causing impossibility or illegality, thus estopping plaintiff from contesting those affirmative defenses. There is no evidence that plaintiff had knowledge of the actual facts underlying the litigation. Indeed, some members of the plaintiff class such as Mrs. Carpenter, intervenor here, might not even have had knowledge of the institution of litigation. On the contrary A & P stockholders were advised by G & W that there was no factual support for the entry of an injunction. G & W can hardly claim now that they should have disbelieved its representation and assumed the worst to be true. Absent any specific knowledge of G & W affairs and intentions, A & P stockholders were entitled to rely upon G & W's representations and therefore cannot be said to have had any knowledge of facts giving rise to either illegality or impossibility before their irrevocable tender of A & P shares.

G & W, relying principally upon our language in Pepsico, Inc. v. FTC, 472 F.2d 179, 187-90 (2d Cir. 1972), cert. denied, 414 U.S. 876, 94 S.Ct. 44, 38 L.Ed.2d 122 (1973), argues that, since the finding of illegality of the tender offer contract was grounded on federal policies underlying the antitrust laws, public interest considerations should preclude enforcement of the contract by plaintiff through recovery of damages. In *Pepsico* we indicated that a court should not enforce a contract where performance has been enjoined by a federal administrative agency on antitrust grounds as to some but not all parties. This represented no more than a federal variant of the doctrine of impossibility which is necessarily dependent in its operation, in the federal sphere as elsewhere, upon equitable considerations, such as fault. Indeed Judge Clark specifi-

cally noted that the "contractual duty is discharged, in the absence of circumstances showing . . . contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited by an administrative order . . . ." L. N. Jackson & Co. v. Royal Norwegian Government, 177 F.2d 694, 697 (2d Cir. 1949), cert. denied, 339 U.S. 914, 70 S.Ct. 574, 94 L.Ed. 1340 (1950); see, e.g., Texas Co. v. Hograth Shipping Co., 256 U.S. 619, 41 S.Ct. 612, 65 L.Ed. 1123 (1921); New York Trust Co. v. SEC, 131 F.2d 274 (2d Cir. 1942), cert. denied, 318 U.S. 786, 63 S.Ct. 981, 87 L.Ed. 1153 (1943).

The district court also based its grant of summary judgment to the defendants on the ground that the plaintiff class suffered "no damage cognizable at law." However, the court's reasoning with respect to the absence of damage, at least insofar as it pertains to plaintiff's suit for breach of contract, is unclear. At one point Judge Duffy asserted that the tendering stockholders did not suffer loss of use of their shares, which would be a relevant criterion for measuring Williams Act damages, but not those attributable to breach of contract. At another point he asserted, erroneously in our view, that we rejected the contention that G & W should be required to make any payment for the tendered shares in our G & W v. A & P opinion. Our decision there merely held that the tendering shareholders had no right to consummate an illegal tender offer. We were not called upon to decide whether damages might be awarded for breach of the tender offer contract. That problem was left for another day, which now seems to have arrived.

While we cannot finally decide the issue of damages at this time because of the dearth of relevant facts, it appears that for breach of contract the damages recoverable would be the normal measure, i.e., "the difference

between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . .," N.Y. Uniform Commercial Code §2-708(1), McKinney's Consol. Laws, c. 38.

* * * *